Haas Garage Door Co. *and* Northwest Ohio District Council of Carpenters. Case 8–CA–23257

September 30, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On August 8, 1991, Administrative Law Judge Martin J. Linsky issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed an answering brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent was a member of the Associated Door Contractors of Toledo (Association), a multiemployer association. Beginning in 1974 and continuously thereafter, various agreements were in effect between the Association and the Union. The most recent collective-bargaining agreement between the Association and the Union, which was signed by them in November 1989, was effective from January 1, 1990, through December 31, 1993.

On October 10, 1990, the Respondent attempted to withdraw from the Association. Prior to that date, however, the Respondent had failed and refused to execute the 1990–1993 collective-bargaining agreement, which the Union had requested it to do in a letter dated July 25, 1990. Further, the Respondent refused to furnish information requested by the Union in a separate letter dated July 25, 1990.[3]

The Respondent admits that it did not execute the collective-bargaining agreement as requested by the Union or respond to the Union's information request. Its defense is that it is not bound to the 1990–1993 agreement because it has no employees doing unit work, but rather uses independent contractors to do such work.[4]

The judge found that the Respondent's attempted withdrawal from the Association was untimely because it occurred after the 1990–1993 contract had been agreed to, and thus that the Respondent was bound to the 1990–1993 contract. The judge concluded that the Respondent violated Section 8(a)(5) and (1) of the Act by repudiating the contract, and by refusing to execute the 1990–1993 contract as requested by the Union. Further, having found that the information requested by the Union in its July 25, 1990 letter was necessary and relevant to the Union's performance of its duties as the exclusive bargaining representative, the judge also concluded that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to furnish this information to the Union.

The judge rejected the Respondent's defense that it is not bound to the 1990–1993 contract because it has no employees performing unit work. The judge found that because the Respondent is engaged in the construction industry, the principles covering 8(f) agreements, as elucidated in *John Deklewa & Sons*,[5] apply here. The judge stated that an 8(f) agreement covers terms and conditions of employment for workers not yet hired, and that even if the Respondent has no employees doing unit work it cannot repudiate the contract during its term. He noted that Pauwels and Otte do virtually all the Respondent's garage door installing, and that they appear to be independent contractors rather than employees.[6] The judge then found that the work of employee Van Dorn, an electric garage door opener repairman, appeared to be unit work.

Contrary to the judge, we find merit in the Respondent's defense that it is not bound to the contract because it has no employees doing unit work.[7] Initially,

[1] The Charging Party, joined by the General Counsel, filed a motion to strike the affidavits attached to the Respondent's brief in support of exceptions, as well as those portions of the Respondent's brief in support of exceptions which quote from and/or refer to the affidavits. The Respondent filed a reply to the Charging Party's motion to strike. The affidavits which the Charging Party seeks to strike cannot now be relied on because they were not introduced into evidence during the hearing before the administrative law judge and thus were not made part of the record. Therefore, we grant the motion to strike. *Consolidated Casinos Corp.*, 266 NLRB 988 fn. 3 (1983); *Natural Heating Systems*, 252 NLRB 1082 fn. 1 (1980).

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] The information requested by the Union included the location and starting and termination dates of each jobsite worked by the Respondent from January 1, 1990, to the present; the specific work to be performed at each jobsite; the name, address, and social security number of each employee performing work at each of the jobsites; and the number of hours worked, hourly wage, and fringe benefits paid to each of the employees.

[4] Sec. XIX of the 1990–1993 collective-bargaining agreement provides that work covered by the contract may be done by subcontractors who have signed agreements with the Union.

[5] 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 109 S.Ct. 222 (1988).

[6] In concluding that Pauwels and Otte were independent contractors, the judge noted that Pauwels and Otte are paid by the job, the Respondent does not withhold taxes for them, they use their own equipment, they do work for other contractors, and they sometimes refuse work offered by the Respondent. Further, both Pauwels and Otte are signatories as contractors to the 1990–1993 contract between the Association and the Union.

[7] We note that the unit set forth in the complaint is limited to the Respondent's employees.

we disagree with the judge's finding that even if an employer has no employees doing unit work it cannot repudiate an 8(f) contract. Rather, the Board has held that the one-man unit rule applies in an 8(f) context. That rule provides that when a unit consists of no more than a single permanent employee at all material times, an employer has no statutory duty to bargain and thus, will not be found in violation of the Act for disavowing a bargaining agreement and refusing to bargain.[8]

Here, we find that there is no evidence that the Respondent has had more than one employee performing unit work at all material times, and thus we find the one-man unit rule applies in this case. We adopt the judge's finding that Pauwels and Otte are independent contractors and not employees. Further, the judge also found that Pauwels and Otte—who have performed work for the Respondent for approximately 30 years and 18 to 20 years, respectively—have done virtually all the Respondent's garage door installing, which is undisputed unit work. The Respondent has no other employees who perform installation work. Regarding Van Dorn, who has worked for the Respondent in the same capacity since 1979, the judge found that his work, repairing garage door openers, appeared to be unit work. The Respondent contends, however, that Van Dorn does not do unit work because the unit includes only employees doing commercial work related to the installation or repair of garage doors, and that Van Dorn does primarily residential work. We find it unclear from the record whether Van Dorn performs primarily residential or commercial work. In light of our application of the one-man unit rule to this case, however, we find it unnecessary to determine whether Van Dorn is included in the unit because, even assuming that he is a unit member, we find that the Respondent would have at most one employee performing unit work at all material times.

Accordingly, we find that the Respondent did not violate Section 8(a)(5) and (1) by repudiating the contract, by refusing to execute the contract, or by refusing to furnish information to the Union. We therefore shall dismiss the complaint in its entirety.

ORDER

The complaint is dismissed.

[8] *Wilson & Sons Heating & Plumbing*, 302 NLRB 802 (1991), enf. denied on other grounds 140 LRRM 3042 (1992); *Searls Refrigeration Co.*, 297 NLRB 133 (1989); *Stack Electric*, 290 NLRB 575 (1988); and *Garman Construction Co.*, 287 NLRB 88 (1987).

Mark F. Neubecker, Esq., for the General Counsel.
Donal Hummer, Esq., of Toledo, Ohio, for the Respondent.
John M. Roca, Esq., of Toledo, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. On November 30, 1990, the charge in Case 8–CA–23257 was filed by the Northwest Ohio District Council of Carpenters (the Union) against Respondent Haas Garage Door Co.

Thereafter, on January 31, 1991, the National Labor Relations Board, by the Regional Director for Region 8, issued a complaint in Case 8–CA–23257[1] alleging that Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) when it failed and refused to sign a collective-bargaining agreement with the Union, when it failed and refused to furnish information requested by the Union, and when it refused to abide by and repudiated its collective-bargaining agreement with the Union.

Respondent filed an answer in which it denied that it violated the Act in any way.

A hearing was held before me in Toledo, Ohio, on May 21, 1991.

I find that the General Counsel has proved its case and will recommend an appropriate remedy.

Based on the entire record in this case, to include posthearing briefs filed by the General Counsel, Respondent, and the Charging Party, and based on my observation of the witnesses and their deameanor,[2] I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Haas Garage Door Co. an Ohio corporation, with an office and place of business in Perrysburg, Ohio, has been engaged in the sale and installation and service of overhead garage doors for residential and commercial customers.

Annually, Respondent, in the course and conduct of its business operations described above, derived gross revenues in excess of $500,000 and has purchased and received at its Perrysburg, Ohio facility products, goods, and materials valued in excess of $50,000 directly from points outside the State of Ohio.

Respondent is now, and has been at all times material, an empoyer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Northwest Ohio District Council of Carpenters is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

Ken ''Duke'' Haas is the President of Respondent. Respondent is in the business of selling, installing, and servicing garage doors.

[1] This case, i.e., Case 8–CA–23257, was part of a consolidated complaint with Case 8–CA–23258 in which the Respondent was Nofziger Door Sale, Inc. The case against Nofziger settled prior to the hearing in the instant case.

[2] I found all the witnesses to be honest and credible. Some witnesses had better recollections however, and their testimony received greater weight.

Back in the mid-1970s Ken ''Duke'' Haas, on behalf of Respondent, was one of several founders of the Associated Door Contractors of Toledo (the Association). The Association was a multiemployer association set up for the purpose, inter alia, of representing its employer members in negotiating wages, hours, working conditions and other terms and conditions of employment, and administering collective-bargaining agreements with initially the Maumee Valley Carpenters District Council and later the successor to the Maumee Valley Carpenters District Council, namely, the Northwest Ohio District Council of Carpenters, the Union, or the Charging Party.

Beginning in 1974 and continuously thereafter various agreements were in effect between the Associated Door Contractors of Toledo and the Union. An agreement which ran from July 1, 1984, through March 31, 1986, was continued in effect by mutual agreement of the Association and the Union.

On January 27, 1989, the Union wrote to Kevin Smith, the president of the Association, to advise that the Union wished to negotiate with the Association for a successor collective-bargaining agreement. Copies of this letter were sent to a number of contractors who were employer-members of the Association, to include the Respondent.

On February 10, 1989, the Union sent another letter to Kevin Smith, the president of the Association. In this letter, copies of which were sent to the employer-members of the Association, to include the Respondent, the Union made an information request of the employer-members of the Association.

A copy of this February 10, 1989 letter containing the information request and stating that the information was being sought by the Union for its use in the upcoming negotiations with the Association was received by Respondent. Respondent's general manager, Tom Haas, the son of President Ken ''Duke'' Haas, furnished to the Union the information it sought in the February 10, 1989 letter.

Negotiations began sometime thereafter. A number of sessions were held before agreement was reached on a successor collective-bargaining agreement. None of the employer-members of the Association attended every session. One member attended none of the sessions.

Respondent's general manager, Tom Haas, who is also the son of Respondent's president, admits he attended three meetings in connection with the new contract. At least one of these meetings was a negotiating session with the Union in attendance.

At this session Union Business Representative Ron Rothenbuhler remembered Tom Haas joining in a management caucus during the negotiating session and expressing an opinion regarding the union pension demand and the applicability of the contract to residential versus commercial work. Neither Tom Haas nor Bill Brennan, executive director of the Association, remember what role, if any, Tom Haas played in that negotiating session. I credit Ron Rothenbuhler's testimony.

Suffice it to say the Association and the Union reached agreement on a contract which was to run from January 1, 1990, through December 31, 1993. The Union and the Associated Door Contractors of Toledo signed the contract sometime in November 1989.

At no time between the mid-1970s when the Associated Door Contractors of Toledo came into existence with Ken ''Duke'' Haas as one of several founding members, up to the time the latest contract went into effect did Respondent ever attempt to withdraw from the Association or withdraw its delegation of bargaining authority from the Association. At no time between the mid-1970s and the effective date of the latest contract, January 1, 1990, did Respondent ever tell the Union directly or indirectly, orally or in writing, that it was withdrawing from the Association or withdrawing its delegation of bargaining authority to the Association.

Indeed, Respondent actively participated in the negotiations for the new contract, e.g., it complied with the union request for information in February 1989 which information the Union said in its letter it needed ''in preparing for the beginning of negotiations with the Associated Door Contractors of Toledo.'' Respondent's general manager attended three meetings in connection with the new contract to include at least one negotiating session with the Union.

Both Union Business Representative Ron Rothenbuhler and Association Executive Director and Chief Negotiator Bill Brennan credibly testified without contradiction—that Respondent never indicated, directly or indirectly, orally or in writing, that it no longer considered itself a member of the Association.

On October 10, 1990, Respondent withdrew from the Association.

Prior to October 10, 1990, however, Respondent, had failed and refused to execute the January 1, 1990, through December 31, 1993 collective-bargaining agreement which the Union requested it to do in a letter dated July 25, 1990. In addition, Respondent failed and refused to furnish information requested by the Union in a letter dated July 25, 1990.

The Union request for information in a letter from Union Business Representative Ron Rothenbuhler to the chief executive officer of Respondent was as follows:

> Please be advised that I am a Business Representative for the Northwest Ohio District Council of Carpenters. As you are aware, the Northwest Ohio District Council of Carpenters has a collective bargaining agreement with the Associated Door Contractors of Toledo, with which you are affiliated, concerning so called ''commercial'' door work. In order to assure that each contractor signatory to this agreement is observing the terms of the same, the Union is asking that you provide the following information in order for the Union to determine whether any of its provisions have been violated. Thus, the Union is requesting the following:
>
> (1) the location, starting date, termination date, of each jobsite you have worked since January 1, 1990 to the present.
> (2) describe specifically the work that was to be performed at each of the jobsites in paragraph 1 above.
> (3) the name, address, and social security number of each employee performing work on each of the jobsites mentioned in paragraph 1 above.
> (4) the number of hours worked, hourly wage, and fringe benefits, paid to each of the employees or on behalf of the employees mentioned in paragraph 3 above.

> Again, this information is necessary for the Union to determine whether or not the collective bargaining agreement has been violated.
>
> Please respond within ten (10) days of the date of this letter or the Union will have no other choice but to undertake all lawful action to secure a response.
>
> Thank you for your cooperation in this matter.

Respondent admits it did not sign or execute the contract as requested by the Union and that it did not respond to the Union information request. Its defense is that it is not bound by the 1990 to 1993 contract between the Association and the Union because while it has employees working as salesmen for example it claims it has no employees doing the unit work described in the contract but uses independent contractors to do that work. In short, Respondent has repudiated the contract.

Respondent did not timely withdraw from the multiemployer Association, therefore, it is bound by the agreement reached between the Union and the Association. See *Acropolis Painting*, 272 NLRB 150 (1984); *Retail Associates*, 120 NLRB 388 (1958). It is clear that withdrawal from a multiemployer Association subsequent to a contract being agreed to is grossly untimely. Therefore, Respondent is bound by the contact agreed to in November 1989 by the Asociation and the Union scheduled to run from January 1, 1990, through December 31, 1993.

An individual member of a multiemployer Association which Assocaition has a contract with the Union must, if requested by the Union, execute or sign the agreement. See *Buffalo Bituminous*, 227 NLRB 99 (1976), enfd. 564 F.2d 267 (8th Cir. 1977). Accordingly, Respondent violated the Act when it refused to sign the 1990–1993 contract.

An employer violates the Act if it refuses to turn over information requested by the Union provided the information sought by the Union is necessary for, and relevant to, the Union's performance of its function as the exclusive bargaining representative of the unit. See *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967).

The information sought in the Union's letter of July 25, 1990, which is set out above, is so obviously necessary and relevant to the Union's performance of its duties that no explanation on why need be made. It is obvious in the extreme that the information, which no one claims is unduly burdensome to collect, is necessary and relevant to see if the contract is being complied with by Respondent. The thrust of the request is to determine if employees represented by the Union are indeed working and to determine if the appropriate wage and fringe benefits are being paid. Accordingly, Respondent violated the Act when it failed and refused to furnish this information to the Union.

Respondent's defense that it isn't bound by the contract because it has no employees doing the work described as unit work in the contract is no defense in this case.

The installation and servicing of garage doors is construction industry work and no party to this case maintains otherwise. Therefore, the principles of *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 107 S.Ct. 222 (1988), control. A party may not reputiate an 8(f) agreement during its term. The 8(f) agreements are allowed in the construction industry. An 8(f) agreement is an agreement between an employer and a union which covers terms and conditions of employment for workers not yet hired. Accordingly, even if Respondent has no employees doing so-called unit work that does not mean it can repudiate the contract, refuse to execute the contract, or refuse to turn over to the Union information necessary and relevant to the Union's discharge of its obligations.

Tom Pauwels and James Otte, both of whom testified, do virtually all of Respondent's garage door installing and appear to be independent contractors and not employees. They are paid by the job, Respondent does not withhold taxes, they use their own equipment, they do work for other contractors, and sometimes refuse work offered by Respondent. Both Pauwells and Otte are themselves signatories as contractors to the 1990–1993 contract between the Associated Door Contractors of Toledo and the Union. However, the work described to be that of Respondent's employee Richard Van Dorn, an electric garage door opener repairman, appears clearly to be unit work.

Suffice it to say Respondent violated the Act when it repudiated the contract, failed and refused to execute the contract when requested, and failed and refused to furnish the information requested by the Union in its July 25, 1990 letter.

III. THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I will recommend that it be ordered to cease and desist and take certain affirmative action designed to effectuate the policies of the Act. The Respondent will be ordered to make whole, as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), any employees for losses they may have suffered as a result of the Respondent's failure to adhere to the contract, with interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By repudiating its current collective-bargaining agreement with the Union, by refusing to execute its current collective-bargaining agreement with the Union, and by refusing to turn over information requested by the Union on July 25, 1990, which is necessary and relevant to the Union's performance of its collective-bargaining duties, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

4. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]